

STAFF REPORT FOR CALENDAR ITEM NO.: 11
FOR THE MEETING OF: September 14, 2017

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

A resolution to approve the TJPA's payment of \$1,159,694 to the Millennium Tower Association ("MTA") to satisfy the TJPA's obligation under the 2008 Easement Agreement with MTA requiring the TJPA to reconstruct a wall separating the Millennium Tower at 301 Mission and the Transit Center.

SUMMARY:

This item concerns a proposed Waiver and Release Agreement ("Agreement") between the TJPA and MTA concerning the TJPA's obligation to pay MTA the cost to reconstruct a wall separating the Millennium Tower and the Transit Center. In the 2008 Easement Agreement between the TJPA and MTA's predecessor, Mission Street Development LLC, the developer of the Millennium Tower granted the TJPA a five-foot wide temporary construction easement on the Millennium property to facilitate the installation of the required TJPA Trainbox shoring wall. In return, the TJPA agreed to remove the existing MTA wall located within the temporary construction easement area, build a temporary wall at a new location separating the Millennium Tower from the Transbay Terminal to permit the TJPA's use of the easement, then replace the temporary wall with a permanent wall at the original location and at the TJPA's cost when it finished construction. Alternatively, the TJPA agreed to leave the temporary wall as-is and pay MTA to build the permanent wall itself. The TJPA staff and MTA have reached a tentative agreement that the TJPA will pay MTA the \$1,159,694 cost to build the permanent wall, MTA will build the wall, and MTA will release the TJPA from any further obligation for the permanent wall.

DISCUSSION:

On October 10, 2008, the TJPA and Mission Street Development LLC ("MSD") entered into an Easement Agreement, which was recorded on March 26, 2009. On September 1, 2011, the TJPA and MSD entered into a First Amendment to Easement Agreement, which was recorded on November 3, 2011. The First Amendment to Easement Agreement provides that MTA is the successor to MSD as the owner of 301 Mission.

Under the Easement Agreement, MSD granted the TJPA a temporary construction easement five feet wide between the Millennium Tower and the Transit Center for the TJPA's use for construction of the Transit Center. In exchange, the TJPA agreed to (1) remove the existing wall and construct a temporary wall on the boundary between 301 Mission and the Transit Center during the construction of the Transit Center to protect the TJPA's construction from interfering with the Tower's driveway ("Temporary Wall"), and (2) at its sole expense, replace the Temporary Wall with a permanent wall in the temporary easement area and restore any ancillary improvements of 301 Mission that the TJPA removed during construction of the Transit Center (collectively, "Permanent Wall"). The Temporary Wall was constructed under a CM/GC trade package awarded in November 2010 for a total cost of \$749,733. The Easement Agreement gave MSD the option to require the TJPA to build the Permanent Wall or for MSD to build the Permanent Wall itself at the TJPA's cost. The Permanent Wall will require an underground foundation.

On March 29, 2017, MTA filed a complaint against multiple defendants, including the TJPA, in San Francisco Superior Court, case number CGC-17-557830 (the “Litigation”). On June 30, 2017, MTA filed its First Amended Complaint in the Litigation. That complaint alleges against the TJPA causes of action for Inverse Condemnation, Trespass, Nuisance, and violations of California Civil Code section 832 arising from excessive vertical settlement and tilt of the Millennium Tower (“Tower”). MTA alleges in the Litigation that the TJPA is responsible for all or a portion of the settlement and tilt of the Tower as a result of the TJPA’s construction of the Transit Center. The First Amended Complaint also contains allegations that the TJPA violated the Easement Agreement. Other individuals or entities have filed lawsuits against the TJPA in San Francisco Superior Court that arise out of the same or substantially similar facts and circumstances as the facts and circumstances underlying the Litigation.

Rather than risk MTA contending in the future that the TJPA’s construction of the Permanent Wall contributed to the settlement or tilt of the Millennium Tower and adding such claims to the Litigation, the TJPA retained tbd Consultants (“tbd”), a San Francisco construction cost management firm, to provide a preliminary design of the improvements for an above-ground Permanent Wall and estimate the total cost of construction. The estimate includes the cost of an underground foundation, but of indeterminate design to avoid MTA’s claiming that the TJPA is liable for a defective design of the wall’s foundation. tbd estimated the cost to construct the wall at \$1,159,694. The TJPA offered to pay MTA the full tbd cost estimate on the condition that MTA build the wall itself and assume all risk that the wall could cause further movement of the Millennium Tower, in exchange for a release from the TJPA’s obligation under the Easement Agreement to build the Permanent Wall.

MTA accepted the TJPA’s offer. Under the attached Agreement, MTA will bear full responsibility for obtaining any permits or other approvals that may be necessary for the removal of the temporary wall and construction of the Permanent Wall, bear all responsibility and liability for designing and constructing the Permanent Wall, release the TJPA from any further obligation for the Permanent Wall under the Easement Agreement, and indemnify the TJPA from any claims against the TJPA arising from MTA’s design and construction of the Permanent Wall. Under the Agreement, the TJPA would avoid the risk that MTA or other plaintiffs in the Litigation would allege that the construction of the Permanent Wall is a cause of settlement or tilt of the Millennium Tower.

\$1,000,000 is being carried in the TJPA approved budget for this scope. An additional \$159,694 will need to be transferred from Construction Contingency.

RECOMMENDATION:

Staff and legal counsel recommend that the Board approve the Waiver and Release Agreement authorizing the payment of \$1,159,694 to MTA for a full release of the TJPA’s obligation for construction of the Permanent Wall under the Easement Agreement.

ENCLOSURES:

1. Resolution
2. Waiver and Release Agreement

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, On October 10, 2008, the TJPA and Mission Street Development LLC (“MSD”), the developer of the Millennium Tower at 301 Mission, entered into an Easement Agreement, recorded on March 26, 2009; and

WHEREAS, On September 1, 2011, the TJPA and MSD entered into a First Amendment to Easement Agreement, recorded on November 3, 2011, providing that MTA is the successor to MSD as the owner of 301 Mission; and

WHEREAS, Under the Easement Agreement, MSD granted the TJPA a temporary construction easement five feet wide between the Millennium Tower and the Transit Center for the TJPA’s use for construction of the Transit Center, and in exchange, the TJPA agreed to (1) construct a temporary wall on the boundary between 301 Mission and the Transit Center during the construction of the Transit Center to protect the TJPA’s construction from interfering with the Millennium Tower’s driveway (“Temporary Wall”), and (2) at its sole expense, replace the Temporary Wall with a permanent wall in the temporary easement area and restore any ancillary improvements of 301 Mission that the TJPA removed during construction of the Transit Center (collectively, “Permanent Wall”); and

WHEREAS, The Easement Agreement gave MSD the option to require the TJPA to build the Permanent Wall or for MSD to build the Permanent Wall itself at the TJPA’s cost; and

WHEREAS, On March 29, 2017, MTA filed a complaint against multiple defendants, including the TJPA, in San Francisco Superior Court, case number CGC-17-557830 (the “Litigation”), and on June 30, 2017, MTA filed its First Amended Complaint in the Litigation, alleging that the TJPA caused excessive vertical settlement and tilt of the Millennium Tower as a result of the TJPA’s construction of the Transit Center; and

WHEREAS, The TJPA has offered to pay MTA \$1,159,694, representing the full cost to build the Permanent Wall as estimated by the TJPA’s consultant tbd Construction Cost Management, on condition that MTA build the wall itself and assume all risk that the wall could cause further movement of the Millennium Tower, in exchange for a release from the TJPA’s obligation under the Easement Agreement to build the Permanent Wall and a covenant to indemnify the TJPA from claims arising from construction of the Permanent Wall; now, therefore, be it

RESOLVED, That the Board approves the Waiver and Release Agreement authorizing the TJPA’s payment of \$1,159,694 to MTA for a full release of the TJPA’s obligation for construction of the Permanent Wall under the Easement Agreement.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of September 14, 2017.

Secretary, Transbay Joint Powers Authority

WAIVER AND RELEASE AGREEMENT

This Waiver and Release Agreement (“Agreement”) is entered into by and between Millennium Tower Association (“MTA”) and the Transbay Joint Powers Authority (“TJPA”) as of the last date executed below (“Execution Date”). MTA and the TJPA are referred to herein collectively as the “Parties” and each individually as a “Party.”

RECITALS

A. The TJPA is a joint powers agency created under California Government Code Sections 6500 *et seq.*, and is the entity charged with designing and building the Transbay Transit Center Project (“Project”) in San Francisco.

B. MTA is a California nonprofit mutual benefit corporation created under California Civil Code sections 4080 and 5980 that represents the interests of owners of condominium units and sub-associations in the Millennium Tower, located at 301 Mission Street in San Francisco.

C. On October 10, 2008, the TJPA and Mission Street Development LLC (“MSD”) entered into an Easement Agreement, which was recorded on March 26, 2009 as Instrument No. 2009-1739852-00 in the Official Records of the City and County of San Francisco at Reel 1856, Image 0523. On September 1, 2011, the TJPA and MSD entered into a First Amendment to Easement Agreement, which was recorded on November 3, 2011 as Instrument No. 2011-J296169-00 in the Official Records at Reel K516, Image 0535. The First Amendment to Easement Agreement provides that MTA is the successor to MSD as the owner of 301 Mission. Collectively, the 2008 Easement Agreement and the 2011 First Amendment to Easement Agreement are known as the “Easement Agreement.”

D. In Sections II.B.2 and II.B.6 of the Easement Agreement, the TJPA agreed to (1) construct a temporary wall on the boundary between 301 Mission and the Project during the construction of the Project (“Temporary Wall”), and (2) at its sole expense, replace the Temporary Wall with a permanent wall in accordance with the drawings and specifications set forth in Section II.B.2 of the Easement Agreement and restore any ancillary improvements of 301 Mission that the TJPA removed during construction of the Project (collectively, “Permanent Wall”). Section II.B.6 gives MSD the option to require the TJPA to build the Permanent Wall or for MSD to build the Permanent Wall itself at the TJPA’s cost.

E. On March 29, 2017, MTA filed a complaint against multiple defendants, including the TJPA, in San Francisco Superior Court, case number CGC-17-557830 (the “Litigation”). On June 30, 2017, MTA filed its First Amended Complaint in the Litigation. That complaint alleges against the TJPA causes of action for Inverse Condemnation, Trespass, Nuisance, and violations of California Civil Code section 832. The First Amended Complaint also contains allegations regarding the Easement Agreement.

F. Other individuals or entities have filed lawsuits against the TJPA in San Francisco Superior Court that arise out of the same or substantially similar facts and circumstances as the facts and circumstances underlying the Litigation (“Related Cases”).

G. As MSD's successor under the Easement Agreement, the MTA desires to exercise its rights under Section II.B.6 of the Easement Agreement where it will take the Release Payment as defined in Section 2 of this Agreement from the TJPA and have the sole right to determine the timing and scope of work related to the Temporary Wall and Permanent Wall, as further memorialized in Section 3 of this Agreement.

H. The MTA will bear full responsibility for obtaining any permits or other approvals that may be necessary for the construction of the Permanent Wall and bear all responsibility and liability for the Permanent Wall.

In consideration of the mutual promises and covenants contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by all Parties, the Parties agree as follows:

AGREEMENT

1. Release and Waiver of Claims

- a. Except for the obligations created by this Agreement, in exchange for the Release Payment from the TJPA under Section 2 of this Agreement, MTA fully releases, discharges, and forever waives any and all claims, demands, rights, liabilities, debts, and obligations, known or unknown (collectively "Released Claims") against, and agrees not to sue, the TJPA for any of the TJPA's obligations or duties under Section II.B.2 or Section II.B.6 of the Easement Agreement, including, but not limited to, the TJPA's obligations to demolish the Temporary Wall, to restore any ancillary improvements to 301 Mission that the TJPA removed during construction of the Project, and to build the Permanent Wall.
- b. If any facts concerning the Released Claims should be found hereafter to be other than or different from the facts now believed to be true, MTA will remain bound by this Agreement and specifically by the release in this Section of the Agreement. Therefore, with respect to the Released Claims, the MTA hereby expressly, knowingly, and voluntarily waives any rights or benefits provided by Section 1542 of the Civil Code, which states as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

and any other similar law of any jurisdiction. MTA has been advised by its legal counsel and understands and acknowledges the significance and consequences of this release and of the specific waiver of Section 1542.

MTA agrees to the above Release and Waiver [Initials] *SM*

2. Release Payment

As consideration for MTA's release and waiver under Section 1 of this Agreement, and in fulfillment of any remaining obligation under Section II.B.2 or Section II.B.6 of the Easement Agreement, the TJPA shall pay \$1,159,694.00 to MTA ("Release Payment") within fifteen (15) days after the TJPA Board of Directors approves this Agreement under Section 22 of this Agreement. The Release Payment shall be sent in the form of a wire as specified below:

The Bank of New York

1 Wall Street

New York, NY 10286

ABA Number: 021000018

For the benefit of: Pershing LLC

Account Number: 890-051238-5

For Further Credit to: The Millennium Tower Association

For Further Credit to Account Number: 33L112738

As a condition precedent to the TJPA's payment obligation, the MTA must complete, sign, and deliver to the TJPA a federal Form W-9, Request for Taxpayer Identification Number and Certification.

MTA's acceptance of the Release Payment constitutes a full, complete, and final waiver and release of any claim that MTA currently has or may have against TJPA under Section II.B.2 or Section II.B.6 of the Easement Agreement.

3. MTA's Construction of Improvements

Upon receipt of the Release Payment, MTA will bear full responsibility for any demolition, repairs, or maintenance of the Temporary Wall and construction of the Permanent Wall, but has the sole right to determine the timing and scope of work related to the Temporary Wall and Permanent Wall.

4. Indemnification

To the fullest extent permitted by law, and in addition to any other obligations of MTA hereunder, MTA shall indemnify, defend, and hold harmless the TJPA, and its respective officials, officers, employees, and agents ("Indemnified Parties"), jointly and severally, from and against any and all claims, demands, liens, liabilities, actions, causes of action, losses, costs, attorneys' fees, expert witness' fees, damages and expenses of any kind against Indemnified Parties by any party arising from the TJPA's payment of the Release Payment, MTA's demolition of the Temporary Wall, or MTA's construction of the improvements specified in Section II.B.6 of the Easement Agreement.

5. **Attorneys' Fees and Costs**

The Parties agree to bear their own attorneys' fees and all other legal and non-legal costs associated with preparation of this Agreement.

6. **No Admission**

This Agreement and its provisions and any proceedings taken under this Agreement are not intended to be, and shall not be construed or deemed to be, any admission or concession on the part of the Parties, or any of them individually, of any rights or liability under the Easement Agreement, in the Litigation, in the Related Cases, or elsewhere. This Agreement shall not be construed or deemed to be a waiver of, or evidence against, any defense that the TJPA may have to claims against the TJPA arising out of the Easement Agreement, the Litigation, the Related Cases, or elsewhere. Neither this Agreement nor any negotiations or proceedings in pursuance of this Agreement shall be offered or received in any action or proceeding as an admission or concession of liability or wrongdoing of any nature on the part of the Parties, or any of them, or anyone acting on the Parties' respective behalfs. This Agreement is predicated upon unique facts which exist between the Parties and the Parties do not intend this Agreement to be a waiver of any right or position in regards to any third party.

7. **Successors and Assigns**

This Agreement shall be binding upon and inure to the benefit of the Parties and their respective representatives, successors, and assigns. No Party may assign its right under this Agreement without the prior written consent of the other Parties.

8. **No Third Party Beneficiaries**

This Agreement is between the Parties and does not and is not intended to confer any rights or remedies upon any person, including but not limited to any member of MTA, other than the Parties.

9. **Entire Agreement**

This Agreement constitutes the entire agreement between the Parties. There are no further or other agreements or understandings, written or oral, in effect between the Parties relating to the subject matter of this Agreement other than the Easement Agreement.

10. **Modification of Agreement**

It is expressly understood and agreed by the Parties that this Agreement may not be altered, amended, modified, or otherwise changed in any respect except by a writing duly executed by authorized representatives of the Parties.

11. **Mutual Preparation**

The Parties cooperated in the drafting and preparation of this Agreement and thus it shall be deemed drafted by all Parties to the Agreement. The language of all parts of this Agreement

shall be construed as a whole, according to its fair meaning, and not strictly for or against any Party as the drafter of this Agreement.

12. Authority

Each Party respectively represents and warrants to each other Party that the undersigned representative for such Party has full and complete authority to execute, enter into and perform this Agreement and bind that Party to the terms of this Agreement.

13. Non-Liability of TJPA Officials, Employees, and Agents

Notwithstanding anything to the contrary in this Agreement, no board member, officer, employee or agent of the TJPA shall be personally liable to MTA, its successors, or assigns in the event of any default or breach by the TJPA for any obligation of the TJPA under this Agreement.

14. Enforcement

If any Party initiates, or if any Party is required to defend, any legal action or proceeding to enforce or interpret any of the terms of this Agreement brought by a Party, the prevailing Party in such action or proceeding shall be entitled to recover from the nonprevailing Party in such action or proceeding the prevailing Party's reasonable costs and attorneys' fees.

15. Counterparts

This Agreement may be executed in counterparts and delivered by PDF, and each counterpart shall be considered an original, and all of which, taken together, shall constitute one and the same instrument.

16. Recitals Incorporated

The Recitals set forth above, including all definitions in the Recitals, are expressly incorporated as terms of this Agreement.

17. Captions

The captions contained in this Agreement are intended solely for convenience and shall not be construed as full or accurate descriptions of the terms in this Agreement.

18. Governing Law

This Agreement has been executed and delivered in the State of California and its validity, interpretation, performance, and enforcement shall be governed by the laws of the State of California.

19. Severability

If any immaterial portion or portions of this Agreement are held by a court of competent jurisdiction to conflict with any federal, state, or local laws, and as a result such portion or

portions are declared to be invalid and of no force or effect in such jurisdiction, all remaining portions of this Agreement shall otherwise remain in full force and effect and be construed as if such invalid portions had not been included in this Agreement.

20. Independent Investigation

Each Party has made such investigation of the facts pertaining to this Agreement and of all matters pertaining to those facts as it deems necessary.

21. Voluntary and Knowing Execution

Each Party respectively represents and warrants to each other Party that it has thoroughly read and considered all aspects of this Agreement, that it understands all provisions of this Agreement, that it has had the opportunity to consult with counsel, and that it is voluntarily and knowingly entering into this Agreement without duress or coercion of any kind.

22. Approval by TJPA Board of Directors

This Agreement shall not become effective and shall not be binding on the TJPA, or any other party, unless and until the TJPA Board approves the Agreement by Resolution of the Board.

[signatures on following page]

SO AGREED:

Dated: August 25, 2017

MILLENNIUM TOWER ASSOCIATION

By: Steven Mayer

Name: Steven Mayer

Its: President of HOA

Dated: September __, 2017

**TRANSBAY JOINT POWERS
AUTHORITY**

By: _____

Name: Mark Zabaneh

Its: Executive Director

Dated: August 28, 2017

**APPROVED AS TO FORM FOR THE
TJPA:**

Shute, Mihaly & Weinberger LLP

By: Andrew W. Schwartz

Andrew W. Schwartz